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# Goverment State of Penang & Anor v Government of Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — ORIGINATING PETITION NO BKA2–03 OF 2013(P)
RAUS SHARIF PCA, SURIYADI, AHMAD MAAROP, APANDI ALI AND RAMLY ALI FCJJ
14 AUGUST 2014

*Constitutional Law — Federal and state law — Conflict — Whether Parliament acted ultra vires Federal Constitution in enacting ss 10 and 15 of the Local Government Act 1976 ('the LGA') abolishing local government elections and requiring state authority to appoint members of local councils — Whether only State Legislature had jurisdiction over matters concerning local government elections — Whether phrase 'local government' in art 76(4) of the Federal Constitution included local government elections and enabled Parliament to enact the LGA to ensure uniformity of law and policy concerning local government — Whether decision to suspend local government elections policy decision of National Council for Local Government ('the NCLG') established under Federal Constitution — Whether state government could not enact law opposed to the NCLG's decision without prior consultation with the NCLG — Whether state law void for conflicting with the LGA and with articles in Federal Constitution concerning the NCLG*

The petitioners sought to declare void ss 10 and 15 of the Local Government Act 1976 ('the LGA') for preventing state legislatures from providing for local government elections within their states. The petitioners sought to declare that pursuant to arts 74, 76 and 113 of the Federal Constitution and the Lists in the Ninth Schedule thereto, the first petitioner through its State Legislature had sole and exclusive jurisdiction, to the exclusion of Parliament, to enact laws in respect of local government elections in Penang. The petitioners wanted the Federal Court to declare that the second respondent ('the EC') was constitutionally obliged to conduct local government elections in Penang and that it should take immediate steps to assist in the holding of such elections pursuant, inter alia, to the Local Government Elections (Penang Island and Province Wellesley) Enactment 2012 ('Enactment 17'). The second petitioner, who was a Malaysian citizen resident in Penang, contended that local government leaders should not be appointed by the state authority but be elected by the people and be accountable to their electors for the manner in which they conducted their affairs of office. He said s 15 of the LGA unreasonably denied citizens of the right to elect local government leaders when they had the right to elect Members of Parliament and State Assemblymen. Local government elections in West Malaysia were abolished in

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1973 and three years later, the LGA provided that Members of Local Councils should be appointed by the state authority. In 2012, the first petitioner acting pursuant to s 1(4) of the LGA issued an order ('the exemption order') exempting all local authorities in Penang from the operation of s 15 of the LGA. Thereafter, the State Legislature passed Enactment 17, authorising the EC to conduct local government elections in Penang. Despite several requests from the state government, the EC failed to conduct the elections. Whilst the Federal Constitution prescribed what laws were authorised to be passed by Parliament and by the State Legislature respectively, and although the Federal List did not make any reference to local government elections, art 76(4) allowed Parliament for the purpose only of ensuring uniformity of law and policy to make laws with respect to various matters including 'local government'. The petitioners argued that the expression 'local government' in art 76(4) was different from the expression 'local government elections' used in the State List in the Ninth Schedule and that it was wrong for Parliament to assume it had power to legislate on local government elections which was a matter solely within the jurisdiction of the state. The respondents, on the other hand, contended that, as enabled by art 76(4), s 15 of the LGA merely provided for a comprehensive and uniform piece of legislation to regulate all local governments even though the subject matter was within the Legislative power of the state. The respondents said the abolishment of local government elections was a policy decision of the National Council for Local Government ('the NCLG') established under art 95A of the Federal Constitution and it was beyond the powers of the court to make a judgment on that policy. The respondents argued that (a) as the first petitioner had never stated that it had consulted the NCLG, as it was mandated to do under art 95A(6), before it enacted Enactment 17, the Enactment violated that article (b) the exemption order was ultra vires s 1(4) of the LGA as it exceeded the intent and purport of that section (c) as Enactment 17, a state law, was inconsistent with s 15 of the LGA, a federal law, art 75 of the Federal Constitution declared that s 15 should prevail and rendered Enactment 17 void to the extent of the inconsistency.

**Held**, dismissing the petition:

(1) Although local government elections were not expressly provided for under art 76(4) of the Federal Constitution, the expression 'local government' appearing in art 76(4) was wide enough to cover local government elections. Local government elections could not be viewed in isolation. Local government elections related to the local government itself. And for the purpose of ensuring uniformity of law and policy in relation to local government, which had to include local government elections, Parliament considered it fit to enact the 1976 Act (see para 35).

(2) Marshalling the long title of the 1976 Act, the explanatory statement to the Bill of the said Act, the AthiNahappan Report and the *Hansard*, the court was convinced the true intent and purport of Parliament in

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legislating the 1976 Act was to unify and achieve uniformity in the different pieces of state legislations in force at that material time. The enacting of ss 10 and 15 of the 1976 Act was for the purpose of uniformity of law and policy and Parliament did so under powers vested upon it under art 76(4) of the Federal Constitution. Hence, ss 10 and 15 of the 1976 Act were constitutional and not invalid (see para 42).

(3) The first petitioner could not unilaterally, and purporting to act under s 1(4) of the 1976 Act, exempt the application of s 15 of the 1976 Act and revert to the pre-1976 position by reviving local government elections as the issue of suspending local government elections was a policy decision of the NCLG. Any reversal of that policy had to come from the NCLG. The first respondent's exemption order was contrary to that policy and violated art 95A(6) and (7) of the Federal Constitution under which it was mandatory for the first petitioner to have consulted the NCLG before it *gazetted* the exemption order. As the petition was silent as to whether such a requirement was adhered to, the first petitioner had exceeded its jurisdiction in making the exemption order (see paras 45–47).

(4) Enactment 17, which was a state law, was ultra vires art 75 of the Federal Constitution and was void because it was inconsistent with the federal law, ie ss 10 and 15 of the 1976 Act (see para 50).

**[Bahasa Malaysia summary**

Pempetisyen telah memohon untuk mengisytiharkan ss 10 dan 15 Akta Kerajaan Tempatan 1976 ('AKT') tidak sah kerana menghalang Badan Perundangan Negeri daripada memperuntukkan pilihan raya kerajaan tempatan dalam negeri-negeri mereka. Pempetisyen-pempetisyen memohon untuk mengisytiharkan bahawa menurut perkara-perkara 74, 76 dan 113 Perlembagaan Persekutuan dan Senarai-Senarai dalam Jadual Kesembilan, pempetisyen pertama melalui Badan Perundangan negerinya mempunyai bidang kuasa mutlak dan eksklusif, untuk pengecualian Parlimen, untuk menggubal undang-undang berhubung pilihan raya kerajaan tempatan di Pulau Pinang. Pempetisyen-pempetisyen ingin Mahkamah Persekutuan mengisytiharkan bahawa responden kedua ('SP') wajib secara berperlembagaan untuk menjalankan pilihan raya kerajan tempatan di Pulau Pinang dan bahawa ia patut mengambil langkah-langkah segera untuk membantu dalam mengadakan pilihan raya tersebut menurut, antara lain, kepada Enakmen Pilihanraya Kerajaan Tempatan (Pulau Pinang dan Wilayah Wellesly 2012 ('Enakmen 17'). Pempetisyen kedua, yang merupakan pemastautin warganegara Malaysia di Pulau Pinang, berhujah bahawa ketua-ketua kerajaan tempatan tidak patut dilantik oleh pihak berkuasa negeri tetapi dipilih oleh rakyat dan bertanggungjawab kepada pemilih mereka untuk cara yang mana mereka melakukan urusan-urusan pejabat mereka. Dia menyatakan s 15 AKT secara tidak munasabah telah menafikan hak

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warganegara untuk memilih ketua-ketua kerajaan tempatan apabila mereka mempunyai hak untuk memilih Ahli-ahli Parliamen dan Ahli Dewan Undangan Negeri. Pilihan raya kerajaan tempatan di Malaysia Barat telah dimansuhkan pada 1973 dan tiga tahun kemudian, AKT memperuntukkan bahawa Ahli-ahli Majlis Tempatan hendaklah dilantik oleh pihak berkuasa negeri. Pada 2012, pempetisyen pertama telah bertindak menurut s 1(4) AKT dengan mengeluarkan perintah ('perintah pengecualian') mengecualikan semua pihak berkuasa tempatan di Pulau Pinang daripada operasi s 15 AKT. Selepas itu, Badan Perundangan Negeri telah meluluskan Enakmen 17, yang memberi kuasa SP untuk menjalankan pilihan raya kerajaan tempatan di Pulau Pinang. Walaupun beberapa permohonan daripada kerajaan negeri, SP gagal untuk menjalankan pilihan raya. Manakala Perlembagaan Persekutuan menetapkan apakah undang-undang yang diberi kuasa untuk diluluskan oleh Parlimen dan oleh badan perundangan negeri masing-masing, dan walaupun Senarai Persekutuan tidak membuat apa-apa rujukan kepada pilihan raya kerajaan negeri, perkara 76(4) membenarkan Parlimen bagi tujuan hanya untuk memastikan keseragaman undang-undang dan polisi untuk membuat undang-undang berhubung pelbagai perkara termasuk 'local government'. Pempetisyen-pempetisyen berhujah bahawa istilah 'local government' dalam perkara 76(4) adalah berbeza daripada istilah 'local government elections' yang digunakan dalam Senarai Negeri dalam Jadual Kesembilan dan bahawa ia adalah salah untuk Parlimen mengandaikan ia mempunyai kuasa untuk membuat undang-undang pada pilihan raya kerajaan tempatan yang merupakan perkara semata-mata dalam bidang kuasa negeri. Responden-responden, sebaliknya, berhujah bahawa, sebagaimana dibenarkan oleh perkara 76(4), s 14 AKT hanya memperuntukkan untuk perundangan yang komprehensif dan seragam untuk mengawal selia semua kerajaan tempatan meskipun hal perkara itu adalah dalam kuasa perundangan negeri. Responden-responden mengatakan pemansuhan pilihan raya kerajaan tempatan adalah keputusan polisi Majlis Negara Kerajaan Tempatan ('MNKT') yang ditubuhkan di bawah perkara 95A Perlembagaan Persekutuan dan ia adalah melampaui kuasa-kuasa mahkamah untuk membuat penghakiman berhubung polisi tersebut. Responden-responden berhujah bahawa (a) oleh kerana pempetisyen pertama tidak pernah menyatakan bahawa ia telah berunding dengan MNKT, sebagaimana dimandatkan untuk berbuat demikian di bawah perkara 95A(6), sebelum ia menggubal Enakmen 17, Enakmen itu telah melanggar perkara tersebut; (b) perintah pengecualian adalah ultra vires s 1(4) AKT kerana ia melebihi niat dan tujuan seksyen tersebut; (c) oleh kerana Enakmen 17, undang-undang negeri, adalah tidak konsisten dengan s 15 AKT, undang-undang persekutuan, perkara 75 Perlembagaan Persekutuan telah mengisytiharkan bahawa s 15 hendaklah terpakai dan menjadikan Enakmen 17 tidak sah setakat mana ia tidak konsisten.

**Diputuskan**, menolak petisyen:

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(1) Walaupun pilihan raya kerajaan tempatan tidak jelas diperuntukkan di bawah perkara 76(4) Perlembagaan Persekutuan, istilah 'local government' yang terdapat dalam perkara 76(4) adalah cukup luas untuk meliputi pilihan raya kerajaan tempatan. Pilihan raya kerajaan tempatan tidak boleh dilihat secara berasingan. Pilihan raya kerajaan tempatan berkait dengan kerajaan tempatan itu sendiri. Dan bagi tujuan memastikan keseragaman undang-undang dan polisi berkaitan kerajaan tempatan, yang hendaklah melibatkan pilihan raya kerajaan tempatan, Parlimen menganggap ia sesuai untuk menggubal AKT (lihat perenggan 35).

(2) Menyusun tajuk panjang Akta 1976, huraian kepada rang undang-undang Akta tersebut, Laporan Athi Nahappan dan *Hansard*, mahkamah yakin niat sebenar dan tujuan Parlimen membuat undang-undang AKT adalah untuk menyatukan dan mencapai keseragaman dalam perundangan-perundangan negeri yang berbeza yang berkuat kuasa pada masa matan tersebut. Seksyen-seksyen 10 dan 15 AKT dibuat bagi tujuan keseragaman dan polisi undnag-undang dan Parlimen berbuat demikian di bawah kuasa yang diberikan kepadanya di bawah perkara 76(4) Perlembagaan Persekutuan. Justeru, ss 10 dan 15 AKT adalah berperlembagaan dan sah (lihat perenggan 42).

(3) Pempetisyen pertama tidak boleh secara unilateral, dan bertujuan untuk bertindak di bawah s 1(4) Akta 1976, mengecualikan permohonan s 15 AKT dan kembali kepada kedudukan pra-1976 dengan mewujudkan kembali pilihan raya kerajaan tempatan kerana isu penggantungan pilihan raya kerajaan tempatan adalah keputusan polisi MNKT. Apa-apa pembalikan polisi tersebut hendaklah datang daripada MNKT. Perintah pengecualian responden pertama adalah bertentangan dengan polisi tersebut dan melanggar perkara 95A(6) dan (7) Perlembagaan Persekutuan yang mana ia adalah mandatori untuk pempetisyen pertama berunding dengan MNKT sebelum ia *mewartakan* perintah pengecualian itu. Oleh kerana petisyen itu tidak menyatakan apa-apa sama ada keperluan tersebut telah dipatuhi, pempetisyen pertama telah melebihi bidang kuasanya dalam membuat perintah pengecualian itu (lihat perenggan 45–47).

(4) Enakmen 17, yang merupakan undang-undang negeri, adalah ultra vires perkara 75 Perlembagaan Persekutuan dan tidak sah kerana ia tidak konsisten dengan undang-undang persekutuan, iaitu ss 10 dan 15 AKT (lihat perenggan 50). ]

**Notes**

For cases on conflict, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2405–2406.

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**Cases referred to**

*City Council of George Town & Anor, The v The Government of The State of Penang & Anor* [1967] 1 MLJ 169, FC (refd)

*East Union (Malaya) Sdn Bhd v Government of The State of Johore & Government of Malaysia* [1981] 1 MLJ 151, FC (consd)

*Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281, FC (refd)

*Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23, CA (refd)

*Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 119, SC (refd)

*Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

**Legislation referred to**

Federal Constitution arts 4(4), 74, 75, 76, 76(4), 95A, 95A(5), (6), (7), 113, 113(4), 114, 119(1), Ninth Schedule, Lists I, Federal List Lists II, State List, para 4(a)

Local Government Act 1976 ss 1(4), 10, 15, 15(1)

Local Government Elections (Penang Island and Province of Wellesley) Enactment 2012

Local Government Elections Act 1960 s 5, 5A

National Land Code ss 97, 100

*Thommy Thomas (Michelle Sunita Kummar with him) (Thommy Thomas) for the petitioners.*

*Alice Loke Yee Ching (Shaiful Nizam bin Shahrin with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Raus Sharif PCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This petition was filed pursuant to art 4(4) of the Federal Constitution for which leave was granted by this court on 27 June 2013.

**[2]** The first petitioner is the Government of the State of Penang ('Penang State Government'). The second petitioner is a Malaysian citizen who is a resident in the State of Penang.

**[3]** The first respondent is the Government of Malaysia ('federal government'). The second respondent is the Elections Commission which is established under arts 113–114 of the Federal Constitution ('Elections Commission').

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**[4]** In their petition the petitioners sought the following reliefs: A

(a) a declaration that, inter alia, by virtue of arts 74, 76 and 113 of, and the Lists in the Ninth Schedule to the Federal Constitution ('the said provisions'), the state government (through its State Legislature) has the sole and exclusive jurisdiction (to the exclusion of the Federal Parliament) to enact laws in respect of local government elections in the State of Penang; B

(b) a declaration that ss 10 and 15 of the Local Government Act 1976 , in so far as they purport to prevent the State Legislatures from providing for local government elections within their states, is ultra vires the powers of the Federal Parliament under the Federal Constitution, and accordingly, void; C

(c) a declaration that by virtue of: D

(i) the said s 15 exemption; and

(ii) the Local Government Elections (Penang Island and Province of Wellesley) Enactment 2012,

the Elections Commission is validly authorised and required to conduct local government elections within the State of Penang; and E

(d) a declaration that the Elections Commission takes all immediate steps pursuant to the provisions of the Local Government Elections (Penang Island and Province Wellesley) Enactment 2012 or otherwise to assist in the conduct of local government elections in the State of Penang in accordance with its constitutional obligation. F

FACTS

**[5]** At the outset we would like to state here that learned counsel appearing on behalf of the petitioners, Mr Thommy Thomas dedicated a portion of his submissions in highlighting the historical aspect of the local government elections in the State of Penang which is the subject matter of this petition. Since there is no dispute as regard to this, we deem it convenient to set out the same except for some editing. G H

**[6]** The first partially elected local governments in Malaya were conducted in George Town and Malacca pursuant to the Straits Settlements Municipal Act XXVII which came into effect as long ago as 1857. These elections conducted by British authorities were carried on until they were abolished by the Municipal Ordinance 1913. I

**[7]** In 1951, pursuant to a Federation of Malaya Ordinance known as the Local Authorities Elections Ordinance 1950, under which local elections were

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conducted by the relevant local authorities, local elections were once again held in George Town. In 1956, the Municipal Council of George Town became the first local authority in Malaya to be fully elected. On 1 January 1957, George Town was elevated to the status of a city council on the centenary of the Straits Settlements Municipal Act XXVII by Her Majesty, Queen Elizabeth II of the United Kingdom by Royal Charter.

**[8]** After *Merdeka*, the Penang State Legislature enacted the Penang Conduct of Elections Authorisation Enactment 1958 authorising the Elections Commission to conduct local government elections in Penang, pursuant to art 113(4) of the Federal Constitution. Pursuant to this Enactment, elections to the City Council of George Town and other local authorities in the State of Penang were conducted in 1958 and 1961.

**[9]** In 1960, the Federal Parliament acting under its constitutional authority to impose uniform legislation in local government under art 76 of the Federal Constitution, passed the Local Government Elections Act 1960 ('the 1960 Act'). The 1960 Act came into force in all the States of Malaya on 1 June 1960, inter alia, transferred to the Elections Commission the conduct and supervision of elections to all local authorities, which until such transfer were in some States still vested in the state authorities. By virtue of s 5 and 5A of the 1960 Act, which provided for simultaneous election of all councillors every three years, local government elections were conducted by the Elections Commission for the local authorities in the State of Penang in 1963.

**[10]** On 1 March 1965, ostensibly in response to the confrontation with Indonesia, the federal government promulgated the Emergency (Suspension of Local Government Elections) Regulations 1965 ('the Emergency Regulations of 1965') suspending local government elections throughout the States of Malaysia, whilst leaving councillors who had already been elected in place. The then Prime Minister Tunku Abdul Rahman promised the *Dewan Rakyat* that local government elections would be restored once confrontation was over. However, although confrontation with Indonesia ended in 1966, local government elections were never revived.

**[11]** In June 1965, His Majesty the Yang di-Pertuan Agong appointed a Royal Commission of Enquiry ('the RCE') to investigate into the workings of local authorities in West Malaysia chaired by Senator Athi Nahappan. The RCE published its report in December 1968 (Athi Nahappan Report) which, inter alia, recommended 'one composite law replacing all existing laws throughout West Malaysia under which local authorities of all categories at present operate and it should be styled as the Local Government Act'. The

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report also recommended for elective representation in local authorities with the Elections Commission charged with the responsibility of conducting the elections.

**[12]** In 1973 the Federal Parliament terminated the tenure of the surviving elected Councillors in West Malaysia by passing the Local Government (Temporary Provisions) Act 1973 ('the 1973 Act') which also replaced the Emergency Regulations of 1965 which were accordingly repealed. By virtue of s 3(1) of the 1973 Act, which stated that 'all provisions in any law relating to local government elections shall cease to have force or effect', local government elections were abolished throughout West Malaysia.

**[13]** The 1973 Act was repealed in 1976 upon the passing by the Federal Parliament of the Local Government Act 1976 ('the 1976 Act') providing for fully appointed local councils. Section 15(1) of the 1976 Act expressly stated 'notwithstanding anything to the contrary contained in any written law all provisions relating to local government elections shall cease to have force or effect'. Section 10 of the 1976 Act further provides that the Mayor or President and councillors of each local authority are 'to be appointed by the State Authority'.

**[14]** Pursuant to the 1976 Act, the Penang State Government established two local authorities known as the Municipal Council of Penang Island ('the MPPP') and the Municipal Council of Province Wellesley ('the MPSP') with effect from 15 December 1976. The president as well as the councillors in those two local authorities were appointed by the state authority.

THE PETITIONERS' CASE

**[15]** It was contended by the second petitioner that the consequence, effect or result of s 15 of the 1976 Act is that citizens like him who are residents of local authorities in the State of Penang and deemed to be sufficiently mature to vote at general or by-elections for Members of Parliament in federal elections and Assemblymen in state elections, are unreasonably denied a right to vote for municipal leaders at the local government level. Such inequality of treatment according to him not only is discriminatory, but is also defies logic and common sense because it means that citizens are disfranchised from voting at the third and lowest tier of government, that is, the local government.

**[16]** It is the second petitioners' case that as the consequence of the passing of the 1960 Act and 1976 Act by the Federal Parliament, his rights as a citizen and resident in Penang to vote for local government leaders has been denied; as other citizens who are residents of local authorities in the State of Penang. To

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this end the second petitioner vehemently contended that citizens like him who are residents of local authorities in the State of Penang have a constitutional right to vote, 'inter alia', pursuant to art 119(1) of the Federal Constitution. Further, citizens like him also enjoy fundamental liberties under Part II of the Federal Constitution to exercise their democratic right by electing leaders of their choice who would not only governments at the national and state levels, but also leaders of local authorities who exercise sufficient power over the lives of the residents, and who have in their custody and control millions of *ringgit* paid as rates by such residents. Thus, according to him local government leaders have to be accountable to their residents for the manner in which they spend monies belonging to the residents, and the manner in which they lay down and implement local government policies. In short he is saying that local government leaders should be elected by the people rather than appointed by the state authority.

**[17]** The Penang State Government realising the encroachment of the Federal Government into its Legislative powers and the denial of its citizens like the second petitioner's fundamental liberties related thereto, acting pursuant to s 1(4) of the 1976 Act, by way of a Gazette Notification 193/2012 ('exemption order'), exempted the MPPP and MPSP from s 15 of the 1976 Act. The *gazetting* had the effect of exempting the two local authorities in the State of Penang from the application of s 15 of the 1976 Act. As a result, from January 2012, the Federal Legislative prohibition against the holding of local government elections in State of Penang no longer applies.

**[18]** Thereafter, the Penang State Government tabled a Bill entitled the Local Government Elections (Penang Island and Province Wellesley) Bill 2012 at the Penang State Legislative Assembly seeking to authorise the Elections Commission to conduct local government elections in the State of Penang as contemplated under art 113(4) and para 4(a) of the State List in the Ninth Schedule to the Federal Constitution. The said Bill was passed on 9 May 2012 and was *gazetted* on 5 July 2012 as the Local Government Elections (Penang Island and Province Wellesley) Enactment 2012 ('Enactment 17'). Enactment 17 came into force on 28 March 2013.

**[19]** Subsequently, the Chief Minister of Penang wrote to the Chairman of the Elections Commission requesting his assistance to conduct the local government elections in the State of Penang. It was alleged that despite several requests by the Chief Minister of Penang, the Elections Commission had failed to respond to his requests.

**[20]** It is the petitioners' case that the Elections Commission's refusal to commit itself to conduct local government elections in Penang in accordance with Enactment 17 constitutes a serious breach of its constitutional obligation

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as the nation's sole authority entrusted with the conduct of elections. By reason of the matter aforesaid the petitioners filed this petition seeking the abovementioned declaratory orders.

SUBMISSIONS

**[21]** It was submitted by Mr Thommy Thomas that the Penang State Legislative Assembly, had the powers to enact laws on local government elections, pursuant to art 74 and the State List (List II) of the Federal Constitution. He pointed out that the Federal List does not have any reference to local government elections. Thus, it was argued that only the respective State Legislative Assemblies in Malaysia can enact laws relating to their respective local government elections. Therefore the federal government cannot enact laws on this matter, unless they come within the exception under art 76(4) of the Federal Constitution which allows Parliament to enact laws within the subject matter within the legislative powers of the state for the purpose of ensuring uniformity of law and policy. But according to him the Federal Parliament does not have an absolute or unfettered discretion in interpreting the expression 'uniformity of law and policy' within the meaning of art 76(4) of the Federal Constitution. He pointed out that the expression 'local government' used in art 76(4) of the Federal Constitution must be distinguished from the expression 'local government elections' used in the State List in the Ninth Schedule. According to him they are entirely different, distinct, independent and separate matters, and should be treated as such Thus, it was submitted that the reliance by the federal government on the subject matter of 'local government' in order to give it jurisdiction or power to legislate on local government elections would be unconstitutional and to that extent void.

**[22]** It was further submitted that s 15 of the 1976 Act which abolished local government elections altogether and prevented the Penang State Government from holding such election was therefore invalid and accordingly void. In support of his submissions learned counsel referred to us the Federal Court cases of *Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 119; *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281 and *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23.

**[23]** In reply learned senior federal counsel ('SFC') appearing on behalf of the respondents submitted that pursuant to art 76(4) of the Federal Constitution, Parliament can make laws on a subject matter within the Legislative power of the state in respect of matters listed therein if it is for the purpose of ensuring uniformity of law and policy. According to her, the 1976 Act which houses the impugned s 15, is a federal law made under art 76(4)

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providing for a comprehensive and uniform piece of legislation regulating local governments. She further submitted that the abolishment of local government elections was a policy decision made in the National Council for Local Government established under art 95A of the Federal Constitution. Thus being a policy decision she submitted that it was not within the powers of this court to adjudge such policy. The case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265 was cited to support the proposition.

**[24]** Learned SFC also submitted that the exemption order which exempts the whole of Penang from the application of s 15 of the 1976 Act is ultra vires s 1(4) of the 1976 Act. This is because the exemption order had exceeded the scope and limits of s 1(4) of the 1976 Act as the permissible exemption is only for 'any area within any local authority area'. Exempting all the areas under the municipal councils is contrary to the clear intent and purport of s 1(4) of the 1976 Act.

**[25]** She also submitted that Enactment 17 which was legislated by the Penang State Government is ultra vires art 75 of the Federal Constitution as it was inconsistent with s 15 of the 1976 Act. This is because art 75 clearly provides that if any state law is inconsistent with a federal law the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void. The case of *The City Council of George Town & Anor v The Government of The State of Penang & Anor* [1967] 1 MLJ 169 was cited in support of her argument.

**[26]** She further submitted that by enacting Enactment 17, the Penang State Government is in violation of art 95A(5) of the Federal Constitution. This is especially so as art 95A(6) mandated the state government to consult the National Council for Local Government in respect of any proposed legislation dealing with local government. According to her the petition is silent on this issue of whether such a consultation was ever made before Enactment 17 was legislated.

FINDINGS

**[27]** It is clear from the above submissions that the main issue before us is whether the Federal Parliament went beyond its Legislative competency in legislating ss 15 and 10 of the 1976 Act. As stated earlier s 15 had the effect of abolishing local government elections. And instead by virtue of s 10, the Mayor or President and councillors of the local authority are appointed by the state authority.

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**[28]** Before we deal with the issue in question it is pertinent to refer to certain provisions of the Federal Constitution dealing with division of powers between the federal government and state government. The first article is art 74 which provides as follows:

> 74(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal Lists or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

**[29]** Then, we have the Ninth Schedule which clearly draws a clear demarcation of powers between the Federal Parliament and the State Legislature. It is also obvious in the Ninth Schedule that the local government elections is expressly mentioned as a subject matter within the competency of the State Legislature. This is clearly enumerated in para 4(a) of the State List in the Ninth Schedule which reads as follows:

> 4 Local government outside the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, including —
>
> (a) Local administration; municipal corporations; local town and rural board and other local authorities; local government services; local rates; *local government elections*. (Emphasis added.)

**[30]** Notwithstanding this clear demarcation of powers to legislate laws between the Federal Parliament and the State Legislature as stated above, art 76(4) of the Federal Constitution however provides an exception art 76(4) reads as follows:

> 76(4) Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interest in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1)(b) and (3) shall not apply to any law relating to any such matter.

**[31]** Thus, under of art 76(4) of the Federal Constitution, the Federal Parliament can still legislate laws with respect to any matter under the State List for the purpose of ensuring uniformity of law and policy. This court in *East Union (Malaya) Sdn Bhd v Government of The State of Johore & Government of Malaysia* [1981] 1 MLJ 151 ('*East Union*') had laid down the proper test to be administered in determining the constitutionality of the laws made by the

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Parliament under art 76(4) of the Federal Constitution. The test reads as follows:

> In our judgment, the sole test is simply this: does the impugned provision enacted by Parliament ensure uniformity of law land policy? If it does, it is constitutional, regardless of the position previously. If it does not, it is unconstitutional. By this test, the impugned section is within the power of Parliament to enact.

**[32]** We consider the case of *East Union* to be an important authority and almost directly on the point with regard to the relevant issues in the instant case. Thus it is necessary to examine the case in greater detail. What happened in *East Union* was this: East Union Malaya applied by motion for a declaration that s 100 of the National Land Code ('NLC') enacted by the Federal Parliament was void on the ground that it was ultra vires art 76(4) of the Federal Constitution. It was argued that as 'land revenue' and its 'collection' was not enumerated in art 76(4), Parliament did not have power to enact s 100 which deals with the collection of revenue. It was further submitted that even before the NLC there were uniform laws dealing with the *collection of land revenue* in arrears; and, that what was effected by ss 97 and 100 of the NLC was a fundamental change in the law.

**[33]** Learned counsel for East Union although conceded that Parliament may enact laws for the purposes of ensuring uniformity of law and policy under art 76(4) for matters in regard to *land tenure*, he however maintained that *collection of land revenue* is something that did not appear in art 76(4) for which the Federal Parliament was empowered to enact laws for the purposes of ensuring uniformity of law and policy. This court however declined to accept this argument. This court held that land tenure as appears in art 76(4) of the Federal Constitution was wide enough to cover collection of land revenue. This court had taken the view that although collection of land revenue was not expressly provided for under art 76(4) of the Federal Constitution, the Federal Parliament could still legislate laws pertaining to the same under the guise of 'land tenure' as land tenure was wide enough to cover collection of land revenue.

**[34]** Now, adverting to the same issues in the instant case, similar arguments as ventilated in the case of *East Union* was canvassed before us by learned counsel for the petitioners. His bone of contention as we have stated elsewhere in this judgment is that the Federal List does not have any reference to local government elections and thus only the respective State Legislative Assemblies can enact laws relating to their respective local government elections. It therefore follows that the Federal Parliament cannot enact laws on this matter unless they come within the exception under art 76(4) of the Federal Constitution. According to learned counsel as the exceptions listed under art 76(4) is in respect to local government, it does not cover local government

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elections. Thus the reliance by the Federal Parliament in the subject matter of local government which appears in art 76(4) in order to confer upon itself jurisdiction or power to legislate on local government election would be unconstitutional, and to that extend, void.

**[35]** With respect we are unable to agree with him. In our view although local government elections are not expressly provided for under art 76(4) of the Federal Constitution, the expression 'local government' which appears under art 76(4) is wide enough to cover local government elections. In our considered view, local government elections cannot be viewed in isolation. local government elections relate to the local government itself. And for the purpose of ensuring uniformity of law and policy in relation to local government, which must include local government elections, the Federal Parliament had considered it fit to enact the 1976 Act.

**[36]** As stated earlier, the test is whether the impugned provisions enacted by the Federal Parliament is to ensure uniformity of law and policy. To this end we must consider the underlying reasons for the Federal Parliament to enact the 1976 Act which encompasses the impugned ss 10 and 15. The long title to the 1976 Act clearly states that it is 'an Act to revise and consolidate the laws relating to local government'. The preamble of the 1976 Act also makes specific reference to art 76(4) of the Federal Constitution in the following terms, *'Whereas it is expedient for the purpose only of ensuring uniformity of law and policy to make a law with respect to local government'.* (Emphasis added.)

**[37]** The intent and purport of the Federal Parliament in legislating the 1976 Act is also found in the Explanatory Statement of the Bill of the 1976 Act which clearly states:

> The provisions of this Bill reflect the last phase in the development of local government in West Malaysia after the introduction and implementation of the Local Government (Temporary Provisions) Bill, 1973. Whenever a State has restructured its local government in accordance with the intention of that Act, it is envisaged that the State will invoke the provisions of this Bill.
>
> 2 At present there is a lot of confusion caused by the duplication of local government legislations in West Malaysia. The Town Boards Enactment of the Federated Malay States (Cap. 137) applies to the former Federated Malay States and also applied and adopted to Kedah and Pelis: the states of Johore and Terengganu have their own Town Board Enactments respectively; Kelantan has its Municipal Enactment; the former Straits Settlements of Malacca and Penang have their Municipal Ordinance (SS Cap. 133). The Municipalities of Penang, Ipoh and Malacca (and Kuala Lumpur) apply both the Town Boards Enactment of the Federated Malay States and the Municipal Ordinance of the Straits Settlements in parts and portions.
>
> 3 This Bill proposes to consolidate into one legislation all these duplicating laws ...

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**[38]** In fact, the 1976 Act is in line with the recommendations of the Athi Nahappan Report which was prepared in 1970 in which it was, inter alia, recommended:

> one composite law replacing all existing laws throughout West Malaysia under which local authorities of all categories at present operate and it should be styled as the Local Government Act.

**[39]** The above recommendation was made upon its finding that:

> At present there are multifarious legislation governing local authorities. The States of Johore, Kelantan and Terengganu have their own Town Boards Enactment. It is like breaking through a veritable legal jungle to lay one's hand on a specific point. ... In any event, the need for uniformity of the local government law cannot be overstated ... Though local government is a State matter, we are of the view that Parliament should pass the future Local Government Act after such constitutional consultation as are necessary.

**[40]** Further, the speech of the then Minister for Local Government and Environment, Tan Sri Ong Kee Hui in tabling the Local Government Bill is also relevant. The relevant portion in the *Hansard* reads:

> ... masanya sudah sampai bagi Kerajaan mengadakan satu undang-undang yan menyeluruh dan seragam untuk mengelakkan kekeliruan dalam pentadbiran Kerajaan Tempatan dengan adanya undang-undang yang berbagai jenis itu.

**[41]** The underlying reasons for the Federal Parliament to enact ss 10 and 15 is more apparent in the following portion of the *Hansard* which reads as follows:

> ... pilihan raya yang tidak ada diuntukkan atau ada ditetapkan di bawah Seksyen 10 dan Seksyen 15 Rang Undang-undang ini. Ini sebenarnya, telah dikaji dengan teliti oleh Majilis Kebangsaan Kerajaan Tempatan dan wakil-wakil daripada Kerajaan-kerajaan Negeri telah dengan halus memikirkan perkara ini dan telah mengambil keputusan semasa ini, masa kita menstrukturkan baharu Kerajaan Tempatan tidak payahlah kita adakan pilihan raya ...
>
> Lagipun melihat keadaan yang telah sudah dan lapuran-lapuran yang telah disampaikan oleh beberapa Suruhanjaya seperti Suruhanjaya Aziz berkenaan dengan Kerajaan Tempatan Bandar Johor Bahru dan Suruhanjaya Justice Lee Hun Hoe berkenaan dengan Majilis Bandaran Seremban di mana Ahli-ahli di kedua-dua Majilis Tempatan itu ada membuat beberapa kesalahan dalam pentadbiran Majilis-majilis itu. Jadi, kita fikir lebih baiklah pada masa sekarang kita tidak payah mengadakan pilihan raya bagi Majilis Tempatan. Perkara ini telah dibangkitkan di Dewan Rakyat beberapa minggu dahulu dan saya telah menjelaskan sebab-sebabnya kita tidak ada peruntukan supaya Ahli-ahli Majilis Tempatan dipilih oleh orang ramai.

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**[42]** Marshalling the long title of the 1976 Act, the explanatory statement to the Bill of the 1976 Act, the Athi Nahappan Report and the *Hansard* we are convinced that the true intent and purport of the Federal Parliament in legislating the 1976 Act was to unify and to achieve uniformity in the different pieces of State Legislations which were in force at that material time. We therefore hold that the Federal Parliament in enacting ss 10 and 15 of the 1976 Act was for the purpose of uniformity of law and policy. The Federal Parliament did so under powers vested upon it under art 76(4) of the Federal Constitution. Hence, ss 10 and 15 of the 1976 Act are constitutional and not invalid or void as argued by learned counsel for the petitioners.

**[43]** Having ruled that ss 10 and 15 of the 1976 Act are constitutional, the second issue we need to decide is whether the Penang State Government can exempt the application of s 15 of the 1976 Act to the whole of the State of Penang by resorting to s 1(4) of the 1976 Act.

**[44]** The exemption order that was issued by the Penang State Government was made under s 1(4) of the 1976 Act which reads as follows:

> The State Authority may, notwithstanding subsection (2), by notification in the *Gazette* exempt any area within any local authority area from all or any of the provisions of the Act or from any by-laws.

**[45]** We do accept that the state authority is empowered by reason of s 1(4) of the 1976 Act to exempt the application of any provisions in the 1976 Act. This is given. However we are of the view that the Penang State Government cannot unilaterally exempt the application of s 15 of the 1976 Act as the issue to suspend the local government elections was a policy decision of the National Council for Local Government and to be applicable to all local governments in the state. In this regard we agree with the submission of learned SFC that such an exemption would be contrary to the national policy of suspending local government elections when the 1976 Act was enacted.

**[46]** It is our view that the exemption order made by the state government is in violation of art 95A(6) and (7) of the Federal Constitution which provide:

> Article 95A
>
> (6) It shall also be the duty of the Federal Government and the Government of any State to consult the National Council for Local Government in respect of any proposed legislation dealing with local government and it shall be the duty of the National Council for Local Government to advice those Government on any such matter.

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A (7) The Federal Government or the Government of any State may consult the National Council for Local Government in respect of any other matter relating to local government, and it shall be the duty of the National Council for Local Government to advice that Government on any such matter.

B **[47]** Based on the above provisions of the Federal Constitution, we find it imperative that the National Council for the Local Government be consulted by the Penang State Government before such exemption order is *gazetted*. The abolishment of the local government elections was a policy decision undertaken by the National Council for Local Government. Any reversal of the
C said policy must also come from the same ocuncil. The Penang State Government cannot unilaterally, purporting to act under s 4(1) of the 1976 Act, revert to the pre-1976 Act position by reviving the local government elections. The requirement for consultation with the National Council for Local Government is mandatory. Unfortunately, as rightly pointed out by
D learned SFC the petition is silent as to whether such a requirement was adhered to. Thus, in our judgment we find that the Penang State Government had exceeded its jurisdiction in making the exemption order.

E **[48]** There is another important question which begs our consideration — whether the impugned Enactment 17 legislated by the state government is ultra vires art 75 of the Federal Constitution which provides that:

> If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

F

**[49]** A plain reading of art 75 of the Federal Constitution connotes that 'any state law which is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void'. Guidance on this issue can be found in the judgment of this court in the case of *The City*
G *Council of George Town v Government of the State of Penang* [1967] 1 MLJ 169 where it was held that 'a state law is invalidated to the extent of any inconsistency therein with a federal law, by art 75, notwithstanding even that the state law may be within the competency of the State Legislature'.

H **[50]** It is our judgment that Enactment 17 which is a state law is ultra vires art 75 of the Federal Constitution. Enactment 17 is a void because it is inconsistent with the federal law ie ss 10 and 15 of the 1976 Act.

**[51]** Under the circumstances, for the reasons we have ventilated and in light
I of the law we have discussed, we hereby dismiss the petition.

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*Petition dismissed.*

Reported by Ashok Kumar